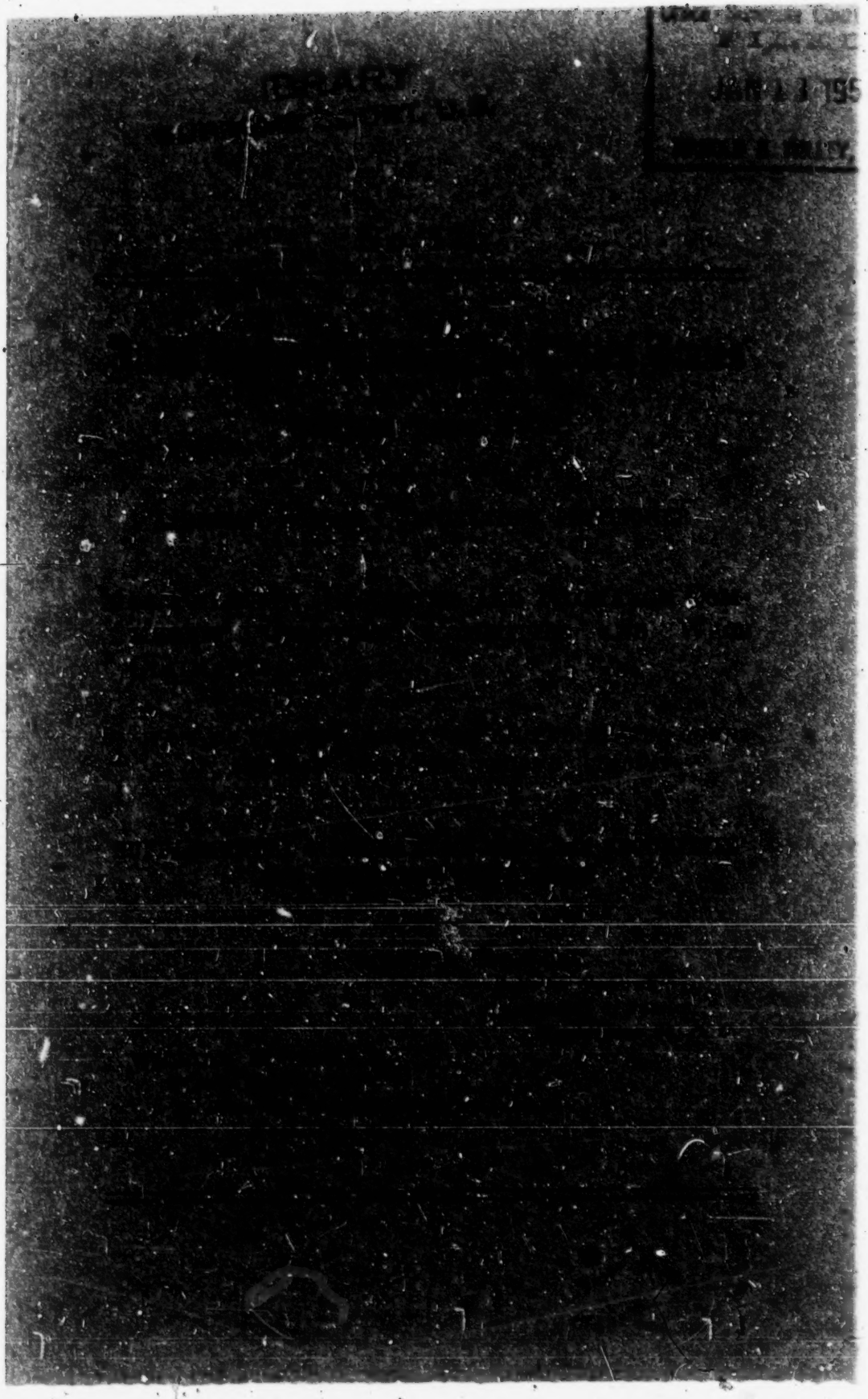

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 170

GENERAL STORES CORPORATION, PETITIONER

v.

MAX SHLENSKY, SECURITIES AND EXCHANGE COMMISSION, CREDITORS' COMMITTEE AND WAGE CLAIMANTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

Two of the parties to this appeal, the Creditors Committee and the Wage Claimants, although designated respondents, support the petitioner and seek to have the order of the court below reversed. Since we had not received their briefs when our brief was filed, we are filing this supplemental memorandum at this time. As pointed out below, the two briefs to which this memorandum is addressed rely in part on material which is not in the record before this Court.

1. The brief for the Wage Claimants sets forth (p. 2) that there are claims "aggregating approximately $248,000, of which almost $90,000 represent claims entitled to priority under * * * the Bankruptcy Act." The Wage Claimants urge that these substantial claims are jeopardized by the determination of the courts below. We believe that for reasons pointed out in our main brief (pp. 41–42, fn. 23) wage claimants would be treated as well under Chapter X as under Chapter XI.[1] In any event, neither the size nor the respective treatment of wage claimants is a determinative criterion on the question whether a particular debtor may utilize Chapter X or Chapter XI under the rationale of *Securities and Exchange Commission* v. *United States Realty & Improvement Company*, 310 U. S. 434.

The Wage Claimants cite in support of their figures only their unsworn petition, containing no record references, which was filed in support of the debtor's petition for a writ of cer-

[1] We there pointed out that presumably Chapter X courts "give recognition to the priority of wage claims on the basis of equitable principles of distribution, such as the 'six months' rule' applied in equity reorganizations." In that connection we note that the legislative history of Chapter X shows that the reason Section 64 of the Bankruptcy Act was made inapplicable to Chapter X proceedings was to permit the priorities of Chapter X to "be those used in equity receiverships" and to permit the reorganization procedure to "be adapted to varied situations necessitating flexibility." Hearings before a Subcommittee of the Committee on the Judiciary on H. R. 8046, 75th Cong., 2d Sess. (1938), pp. 37, 77.

tiorari. As we noted in our main brief (p. 41, fn. 23), the record indicates (R. 41) that the sum of the wage claims involved is only $440.47. In an effort to discover the basis of the discrepancy between this figure and those contained in the brief for the Wage Claimants, we have inquired of counsel and been advised that the claims referred to, which were not included in the debtor's schedule, are for the most part claims for severance pay. Whether and to what extent such claims would be entitled to priority under Section 64 (*a*) of the Bankruptcy Act, particularly where many of the employees presumably continued to work for the debtor for some time after the filing of the petition, are issues which were not before the courts below and are clearly not before this Court.

2. The brief of the Creditors Committee (pp. 3, 6) refers to and appears to rely heavily upon "a proposal to pay the equivalent of 40% of unsecured creditors' claims in full satisfaction thereof," which, it is stated, a majority of the members of the Creditors Committee have indicated they would favor. The arguments made at pages 37–46 of our main brief are fully applicable, assuming a composition along the lines set forth in the brief of the Creditors Committee might be obtainable. It should be noted that neither the proposal referred to nor the action of the Creditors Committee thereon appears in the record.

The brief of the Creditors Committee (p. 6) also goes outside the record in its argument that the appointment of a trustee "to undertake an examination and investigation of the Petitioner's liabilities, property, management and numerous other matters relevant to the formulation of a plan" is "totally unnecessary, for the Creditors Committee has conducted an extensive examination into the affairs of the petitioner * * *." Whatever investigation may have been made, the *Realty* case made clear that Chapter X alone provides for an impartial investigation by an independent trustee within the framework of the larger objectives of that chapter.[2]

3. The brief of the Creditors Committee (p. 2) also notes that the capital stock of the debtor's two major subsidiaries is pledged to secure the payment of notes which become immediately due and payable "with the consequent right of foreclosure on the collateral" in the event the purchaser files a petition for relief under any chapter of the Bankruptcy Act, and the brief emphasizes that the petitioner has obtained a waiver of

[2] The Commission did not suggest, as the Creditors Committee claims (Br. 5), "that it alone possesses 'adequate means for a disinterested analysis of the debtor's financial condition, the desirability of the continuance of the enterprise as presently constituted or on any other basis' (R. 36a) * * *." The Committee's record reference shows that the Commission contended only that these benefits were obtainable in Chapter X.

this provision which "*does not extend to a Chapter X proceeding.*" The Committee ignores that upon the filing of the Chapter X petition the court has power to restrain the sale of the pledged collateral, at least where, as in this case, the stock of the subsidiaries represents a major portion of the assets of the debtor and its sale would be tantamount to a virtual liquidation of the enterprise. See *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 675–678. Indeed, only Chapter X can deal with the secured claims and the pledged assets and thus adequately provide for a feasible reorganization.

4. Finally, the Creditors Committee relies (Br. 4) upon *John Hancock Mutual Life Insurance Co. v. Casey*, 141 F. 2d 104 (C. A. 1), in support of the proposition that Chapter X is unavailable where all the corporate debtor seeks is a composition of its unsecured debts. In that case, which did not involve public investors, the court dismissed the Chapter X proceeding upon the ground that a reorganization under Chapter X was "either unnecessary or impossible." 141 F. 2d at 108. The reference by the court to the plan filed by the debtor in that case appears to have been made primarily to illustrate that the petition had not been filed in good faith. *Id.* at 107. To the extent that any language in the opinion may be construed to hold that the limited nature

of a plan determines the availability of Chapter X or Chapter XI, we submit that the opinion is in conflict with the rationale of this court in the *Realty* case. See our main brief at pages 21–28.

Respectfully submitted.

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JANUARY 1956.

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